Advertising, the Consumer Researcher and Products Liability

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When a product's advertising is introduced in a products liability suit, marketers and consumer researchers can assist both the attorneys and the judge in interpreting its significance. Did the consumer rely on misleading advertising? Did this reliance cause the injury? Appropriate market research can help answer such questions.

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- A commercial for a utility vehicle shows it being driven along the water's edge at the seashore.
- Sports cars are advertised to appeal to youthful drivers.
- A golfing magazine advertises a golf cart that takes "turns with super ease, super safety, super stability. . . . This baby floats the course."
- "You meet the nicest people on a Honda," according to a television commercial.
- Ads for Pabst beer show the product being consumed in the convivial environment of a tavern.

What do these advertising approaches have in common? Success? A certain percentage of increase in sales? Possibly, but the one surprising common denominator is that each tactic was turned against the manufacturer in the courts. Each was used as evidence by a plaintiff suing for products liability, and—except for the last two sales approaches—each aided the plaintiff in the pursuit of damages.

Recently, advertising has been appearing in courtrooms with increasing frequency; however, it is not entirely new in the products liability lawsuit. One of the first opinions to note the importance of advertising was written over 30 years ago in the seminal case of *Rogers v. Toni Home Permanent Co.* [1958]. Here the court used the prevalence of advertising to argue for doing away with privity of contract—the requirement that a defendant must have contracted with a plaintiff in order to be held liable for damages—in a claim for breach of express warranty when a home permanent allegedly damaged the user's hair. The court's words are well-known:

> Today, many manufacturers of merchandise, including the defendant herein, make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. . . . The warranties made by the manufacturer in his advertisements . . . are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.

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The trend toward including defendants' advertising efforts in products liability lawsuits has since escalated.[1] And with this trend, the potential role of the mar-

keter and the consumer behavior researcher has expanded. It is now imperative that advertisers be aware of the risk of liability that may result from their efforts. It is also vital that researchers in consumer behavior understand the theory behind products liability suits. Whether their background is marketing, psychology, or business communications, they need some knowledge of the legal theories if, as seems increasingly likely, they are to be called on as expert witnesses for either side or for the court. The plaintiff may need a consumer researcher to help establish that there was reliance on the defendant's advertising, and that injury resulted from this reliance. The defendant, on the other hand, may need a consumer researcher to help prove that such reliance was unjustified or was not the cause of the injury. The judge may need an expert in consumer behavior to help sort out the conflicting theories.

Several articles provide much of the background necessary to understanding this area. Mowen [1983] succinctly described the civil trial process and included suggestions on how marketing experts could assist in corporate defense. Morgan [1984] carried this approach further by advising marketing personnel on ways to avoid punitive damages. In a more recent article, he provided advice for those who market services and find themselves embroiled in litigation [Morgan 1987]. Surveying products liability trends in general, Dworkin and Sheffet [1985, p.77] made some specific suggestions for preventive steps marketers could take. But none of these articles addressed the specific concern here: the role of marketing or consumer behavior experts in a lawsuit based at least partially on the claim that a product's advertising led to the plaintiff's injury.

Other recent articles have focused on advertising problems but not on the role of the consumer behavior expert. For instance, Mazis, McNeill and Bernhardt [1983] discussed the kinds of empirical evidence needed to establish the effectiveness of corrective advertising. Honigwachs [1987] warned advertisers that they could no longer rely on the defense of "puffing" if their exaggerated claims landed them in court.

These works provide a good beginning for the expert's legal library, but something more is still needed. For readers with expertise in advertising and consumer behavior, this article should provide that missing element: an explanation of the various ways advertising might lead to or enhance a plaintiff's claims in a lawsuit, and suggestions on the tasks the expert might perform at each stage of the litigation.

Legal Issues and Bases

Plaintiffs in recent products liability suits have bolstered their claims by using defendants' advertising in several ingenious ways: (l) They have claimed that the advertising created an express or implied warranty that the manufacturer breached by selling an unsafe product. (2) They have argued that the advertising involved fraud, deceit, or misrepresentation, so they were injured when they relied on such ads. (3) They have charged that, negligently or otherwise, the manufacturer produced an unreasonably dangerous product whose advertising, instead of warning consumers, lulled them into feeling that the product was safe. (4) They have combatted the defendant's response that the product was being misused by showing similar uses in the product's advertising. (5) Finally, they have justified their requests for punitive damages by introducing evidence of advertising that allegedly ignored all risks to consumers.

Claims Based on Breach of Warranties

Although other claims have outstripped them today, a breach of warranty is one of the most basic claims to be made in a products liability suit. It is based on the Uniform Commercial Code (U.C.C.), adopted in virtually every state; any of three sections can be applied. When introduced, advertising is most often used to prove

the existence of an express warranty under §2-313, involving an affirmative statement, a description of the product, or a model of the goods that becomes a part of the "basis of the bargain" between the seller and the consumer.[2] Less frequently, advertising can be introduced to substantiate one of the two implied warranties: merchantability (fitness for sale—§2-314) or fitness for a particular use (§2-315).

Plaintiffs have often pled both express and implied warranties, supported by marketing claims. They have argued both that they were impressed by a specific statement of safety made in the product's advertising (the express warranty) and also that they assumed the product was fit for use simply because it was marketed (the implied warranty of merchantability). This approach succeeded in the 1975 case of *Hauter v. Zogarts*—at least with the judge, who granted the plaintiff a "judgment notwithstanding the jury's verdict" (a JNOV). The case involved a "Golfing Gizmo" sold in a carton labeled "Completely safe ball—will not hit player." Of course, the ball did hit the 13-year-old plaintiff when he was using the Gizmo to improve his golf game. The plaintiff testified to being impressed with the safety claim which constituted the express warranty, so reliance on the product's advertising was established. Although the implied warranty of merchantability did not depend on any specific statement, the court used the same affirmation of safety that constituted the express warranty to demonstrate this breach. The Gizmo did not "[c]onform to the promises or affirmations of fact made on the container or label," and it was not "fit for the ordinary purpose for which such goods are used."

When advertising has been viewed as inadmissible evidence, plaintiffs have had a more difficult time winning on express warranty claims, as shown by *Haynes v. American Motors Corporation* [1982]. The plaintiff was injured when the Jeep CJ she was driving skidded on wet pavement and overturned, throwing her out. Her counsel tried unsuccessfully to introduce as evidence several television commercials for Jeep CJs; these allegedly had convinced the plaintiff that Jeep CJs would be "safe" if driven under the conditions of the accident. The court ruled that the commercials were inadmissible because they either showed a different model of Jeep—a Cherokee instead of a CJ-5—or showed off-road driving so that conditions were not at all similar to those of the accident, a substantial similarity test.

Perhaps recent cases have come to depend less on breach of warranty claims because the need to prove privity and reliance, at least in some jurisdictions, has made them less attractive to plaintiffs than other claims might be. At least one commentator [Beasley 1981] has argued that "warranty actions are truly tools of a time past and no longer deserve acknowledgment in products liability litigation."

Claims Based on Fraud, Deceit, or Misrepresentation

Advertising claims are often the basis for charges of fraud or misrepresentation brought in a products liability suit. These can be just as difficult to establish as a breach of warranty. A plaintiff's difficulty often stems from the need to prove that relying on the misrepresentation was justified and that this reasonable reliance in fact caused the injuries. Of particular interest to marketers, the misrepresentation must be factual, so statements of the sellers' opinions that are considered mere puffing do not aid the plaintiffs. However, courts may be increasingly reluctant to view many exaggerated opinions as acceptable puffing [Honigwachs 1987].

The roles of the opposing attorneys in such a suit are particularly interesting. The plaintiff's attorney will often introduce direct testimony that the user of the product (generally, but not always the plaintiff) relied on the advertising. This places the marketer's attorney in the position of attempting to disprove the reliance or to prove that it was unreasonable. Clearly, reliance can be more difficult to disprove than to prove. Any evidence offered will often be rebutting direct testimony by the plaintiff. One successful defendant was American Safety Equipment Corporation, a manufacturer of safety helmets [*American Safety Equipment*

Corp. v. Winkler 1982]. The company produced two kinds of helmets—one for motorcycling, and one for police riot gear. An off-duty police officer, wearing a discarded riot gear helmet, was involved in a motorcycle accident and suffered a head injury. He claimed that the helmet was marketed as safe for cycling because a picture on the box showed motorcyclists wearing the helmets. But he had been issued both types of helmets and knew the difference between them. His actual knowledge that the helmet was not for cycling nullified any reliance he claimed on the pictures on the box, so the court ruled against him. In most cases, however, facts are hard to come by that so clearly establish pre-existing information separate from marketing communications.

Often the most burdensome tasks of the plaintiffs are (l) distinguishing fact from opinion, or puffing, and (2) proving reliance. Reliance is particularly difficult to prove when the user is deceased, but even when the injured user testifies in court, there is a problem. Testimony that "yes, I used the product because its ads convinced me it was safe" is so obviously self-serving that juries may find it less than convincing. Because of these difficulties, some commentators have suggested that courts should permit a presumption of reliance unless the defense proves otherwise [Whitman 1981]. If such a presumption were to be allowed, the mere admission of advertising into evidence would go a long way toward winning that aspect of the case for the plaintiff.

In at least one recent case, *Rogers v. R. J. Reynolds Tobacco Co.* [1988], the court relied on a novel theory of conspiracy to do away with reliance altogether. The cigarette smoker had died, so there was no testimony as to what advertising had influenced her to smoke. Still, the court was willing to find all of the "Big 6" cigarette manufacturers liable on the basis that "[a]n attractive, stimulating advertisement of one manufacturer could easily influence a person to smoke a different brand of cigarette."

Claims Based on Negligence and Failure To Warn

In some jurisdictions, a manufacturer must be judged negligent before being held liable for injuries caused by his products. Others have adopted standards of strict liability, so negligence is not a requirement. Still others fall at various locations along a spectrum from complete negligence to complete absence of negligence.

In theory, the concept of "strict liability" requires neither a misleading representation from the manufacturer nor reliance by the consumer. Consequently, advertising should not be involved in such a claim at all; yet frequently it is. Marketing practices can influence a court's decision as to whether the product is unreasonably dangerous. Do advertisements show the product being used safely? Can consumers engage in the same activities in their own use without running unnecessary or unanticipated risks? Do warnings or disclaimers accompany the advertising? Courts often want to answer such questions. Of course, it is generally the plaintiff who seeks to introduce advertising to show that particular depictions in ads created certain perceptions of safety, established expectations for use, or invited careless or abusive use or misuse of the product. When the plaintiff used the product as the advertising encouraged, injury resulted. Therefore, according to the plaintiff, the advertising has increased the danger of the product.

Occasionally the court will view a marketing campaign as necessitating stronger warnings even when specific advertisements have not been introduced in evidence. Such was apparently the case in *LeBouef v. Goodyear Tire and Rubber Company* [1980], a particularly interesting Fifth Circuit decision. The claim arose from an accident involving a 1976 Mercury Cougar equipped with Goodyear tires tested to be safe at speeds up to 85 miles per hour. Ford gave one relevant bit of information in the owner's manual: "Continuous driving over 90 mph requires using high-speed capability tires." But the driver, who had been drinking for eight hours and had a blood alcohol reading of .18 percent, was going at least 100 miles per

hour and perhaps as fast as 140 miles per hour when a tire blew. The car left the road and hit a cement culvert, killing the driver. The surviving passenger and the mother of the driver sued both Ford and Goodyear, claiming that both realized the car could be operated at speeds above those for which the tires had been tested.

The trial court of *LeBouef v. Goodyear Tire and Rubber Co.* [1978] did not discuss the Cougar's advertising specifically, but it did comment that "Ford should have foreseen that a significant number of ultimate users of its products would drive their vehicles at top speed. This is particularly true of a sport model automobile such as a Cougar with wide appeal to youthful drivers." It awarded the plaintiffs over $72,000 in damages. When the Fifth Circuit affirmed this award, it introduced the issue of advertising [*LeBouef v. Goodyear Tire and Rubber Co.* 1980]:

> The sports car involved here was marketed with an intended and recognized appeal to youthful drivers. The 425 horsepower engine with which Ford had equipped it provided a capability of speeds over 100 miles per hour, and the car's allure, no doubt exploited in its marketing, lay in no small measure in this power and potential speed. It was not simply foreseeable, but was to be readily expected, that the Cougar would, on occasion, be driven in excess of the 85 mile per hour proven maximum safe operating speed of its Goodyear tires.

Here, the court sounded a bit uncertain; did "no doubt exploited by its marketing" indicate that the marketing had not even been investigated? Certainly, issues related to intended, foreseeable, and recommended uses as well as issues related to characteristics of certain target markets are implicated by the court's language.

Marketing came up again in the opinion in response to Ford's contention that driving over 100 miles per hour was not "normal use." The court responded that "[i]t would be blinking reality in this case to hold that Ford could not reasonably have expected purchasers of any automobile, much less one equipped and marketed as was the Cougar, to transgress our nation's speeding laws periodically."

Combatting the Defense of Misuse

Ford's unsuccessful defense in the case just discussed illustrates one of the common options open to a manufacturer: claim that the product was being misused when it caused the injury. However, plaintiffs often respond to such a defense by introducing evidence from the product's advertising campaign to show that such a use was not unusual and was, in fact, foreseen if not encouraged by the manufacturers.

As the *LeBouef* [1980] opinion illustrated, the court believed that "normal use" could include some distinctly reckless, if not abnormal, activities. The Fifth Circuit attempted to clarify the term in *Woods on Behalf of Woods v. International Harvester* [1983]. "'Normal use' . . . is a term of art . . . delineating the scope of a manufacturer's duty and consequent liability; it encompasses all *reasonably foreseeable* uses of a product." The product's advertising may be used to establish what might be reasonably foreseeable, as it was in this case involving an International Harvester Scout II. The vehicle had been marketed as operable in water and would, in fact, continue to operate until the water reached 32 inches; but at 25 inches, the carbon monoxide from the exhaust pipe became trapped in the rear wheel well. Within one minute, it could pass into the passenger compartment through holes in the wheel well. This occurred while Woods was driving his Scout II through flooded New Orleans, and he died. When his widow and children sued International Harvester, the company argued that driving through such deep water was misuse of the vehicle. Plaintiffs used two kinds of evidence to defeat this argument: instructions from the owner's manual on lubrication necessary for operating in deep water, and videotapes of Scout II commercials. One of these was the seashore tape mentioned in the introduction to this article. The court accepted this as "appropriate evidence of International Harvester's marketing

strategy and of whether deep water use was foreseeable by International Harvester."

Foreseeable use and misuse focus on what the manufacturer should have expected of the consumer. The flip-side of this issue is concerned with what the consumer expected of the product. Another rubric for this same concept is "plaintiff's state of mind." The consumer believed action taken was safe because of expectations about the product's attributes and capabilities. Courts will speak of the plaintiff's false sense of security or say the plaintiff was "lulled into a feeling of safety." A good example of this terminology occurs in the golf cart case, *Blevins v. Cushman Motors* [1977]. The plaintiff was a passenger in a golf cart which tipped over, pinning him underneath. The resulting injury to his spine made him an inch shorter and complicated his life in other significant ways. In affirming the $94,000 he and his wife were awarded, the court relied upon print advertisements in a golfing magazine. These read, in part, as follows:

> Talk about a turned on ride. Smooooth. With a beefier, low-slung 3-point rubber suspension. New rubber suspension between power frame and main frame lets the GC tool through turns with super ease, super safety, super stability. . . . This baby floats the course.

The driver of the cart testified that he had been influenced by such ads to believe that the cart would be safe for the use he made of it—driving between five and nine miles per hour on slightly wet grass. The manufacturer argued contributory fault, an affirmative defense akin to misuse. But the court viewed the advertising as defeating such a defense. According to the court, "The assurances contained in the Cushman advertising were relevant as showing a justified use and reliance by the driver . . . and as tending to show that he was lulled by this advertising into a sense of security." Here, the ads were also part of the plaintiff's proof of causation, since the driver's testimony alone was accepted as proof of reliance. "Foreseeable use," "consumer expectations," "plaintiff's state of mind," and "reliance" were all inextricably linked, and defendant's advertising provided sufficient evidence of such linkage.

Justifying Punitive Damages

When compensatory damages are deemed inadequate for punishment and deterrence of manufacturers whose conduct has been especially outrageous, courts in a majority of states may award punitive damages. These awards may be enormous, and courts appear to be increasingly favoring them [Morgan 1984]. Two Ohio cases illustrate the role played by advertising in justifying such damages.

The first involved an accident that occurred when an open bottle of Liquid-Plumr fell on a toddler, burning and scarring her face horribly [*Drayton v. Jiffee Chemical Corp.* 1975]. Advertisements which claimed the product was safe were used successfully to establish a breach of express warranty. The plaintiff tried to use them also to prove outrageous conduct justifying punitive damages. The court judged this argument to be "more shrill than persuasive." Compensatory damages of $612,466 were awarded, but punitive damages were not.

But a leading case, *Leichtamer v. American Motors Corp.* [1981], turned out differently. That case involved an off-road pitch-over of the Jeep CJ-7 in which the plaintiffs were travelling as passengers. The jury found that plaintiffs' injuries were enhanced by displacement of the roll bar during the accident. The jury verdict for the brother and sister plaintiffs totalled $2,200,000, half of which was punitive. The jurors gave two reasons for the punitive damages award: "Wilfully suggestive advertising depicting Jeeps going up and down steep and rugged terrain without any risk or warning. Grossly neglected to test roll bar support system for foreseeable rollovers and/or foreseeable pitch-overs." Part of the vehicle's safety image, at least in the minds of the jurors, came from its rugged name: Renegade.

The Ohio Supreme Court agreed that these two reasons were sufficient to support the award of punitive damages.

The Roles for Consumer Researchers

Specific roles for consumer researchers depend in part on the legal theories at issue in a case. Table 1 summarizes this relationship and its implication for consumer research experts. Notice, for example, that if the plaintiff has introduced evidence of the defendant's affirmative advertising claims into a products liability suit based on breach of warranty, there is probably no need for marketing experts on either side. As one analyst [Morgan 1979, p. 35] has pointed out, "[T]he simple fact that advertising took place is sufficient corroborative evidence favoring the plaintiff. . . . Advertising content matters very little in [an implied warranty] case."

But if advertising has been introduced to bolster a claim other than breach of warranty, marketers and researchers on consumer behavior may be needed to interpret marketing claims and effects for the court. Personnel from the defendant manufacturer's marketing department may be called on to justify the techniques they used. Independent market researchers may be hired by the plaintiff to explain what consumer reactions to an advertising campaign would be expected. Other

Table 1. Advertising Behavior: How it Can be Brought into a Products Liability Suit and How a Consumer Researcher Can Help

Troublesome Advertising Behavior	Theories of Liability	Assistance Researchers Could Provide	Typical Cases
Advertising makes claims which prove untrue	• Warranty—express or implied (warranty of merchantability, warranty of fitness for a particular use)	• None	*Drayton v. Jiffee Chemical Corp.* [1975], *Hauter v. Zogarts* [1975], *Haynes v. American Motors Corp.* [1982]
	• Fraud, deceit, or misrepresentation	• Provide a context for interpreting the ads • Help to distinguish between fact and opinion (puffing)	*American Safety Equipment v. Winkler* [1982], *Baughn v. Honda Motor Co., Ltd.* [1986]
Advertising masks dangers of the product or dilutes accompanying warnings	• Negligence or failure to warn	• Explain what consumer behavior might be reasonably foreseeable from advertising • Interpret "plaintiff's state of mind" that ads could induce • Describe the difficulty of designing an effective warning and communicating it through advertising • Demonstrate that plaintiff's misuse of the product was foreseeable due to defendant's advertising practices • Argue that advertiser's conduct did/did not so increase the product's danger as to justify the awarding of punitive damages	*Blevins v. Cushman Motors* [1977], *LeBoeuf v. Goodyear Tire and Rubber Co.* [1978; 1980], *Leichtamer v. American Motors Corp.* [1981], *Woods on Behalf of Woods v. International Harvester* [1983], *Maguire v. Pabst Brewing Co.* [1986]

independent market researchers may be hired by the defendant to combat these explanations. In desperation, a judge may hire yet a third market researcher to get an expert opinion that isn't viewed as coming from a "hired gun."

Consumer researchers may be especially necessary in products liability litigation when the focus of the case is on the advertising itself. A person knowledgeable about advertising and marketing can provide the court with the proper context for interpreting the ads. This context includes an examination of whether advertising informs or manipulates consumer behavior, and an explanation of advertising's important but limited role in providing product information. An expert in consumer behavior may be able to point out the differences and similarities between the conditions shown in the ads and the conditions of the accident, as well as demonstrate how the ads have changed over time. Research on consumer perceptions can also aid the court in distinguishing between statements of fact and puffery.

Some of these approaches are illustrated by a recent case stemming from an accident in which two nine-year-olds were injured riding a mini-trail bike on a public street [*Baughn v. Honda Motor Co., Ltd.* 1986]. When the father of one of the boys sued Honda, he argued that he had relied on deceptive advertising—television ads that said "You meet the nicest people on a Honda," described the mini-trail bike as very good for children, and showed children riding it. Because the court understood the proper context of the ads, it was unconvinced; it ruled that the statements in the ads were mere puffing, not justifying reliance.

Another recent case merits attention because its creative use of advertising illustrates several potential roles for marketers or consumer researchers. The plaintiff in *Maguire v. Pabst Brewing Company* [1986] was injured when his car was struck by a driver who admitted she had been drinking Pabst beer in a tavern for six hours. She pled guilty to failure to stop at a stop sign, driving under the influence, and involuntary manslaughter (for the death of Maguire's passenger). Charging that Pabst was liable for causing his injuries, Maguire started a civil suit.

Central to the plaintiff's argument were commercials urging the drinking of Pabst in tavern settings. The opinion by the Iowa Supreme Court included a lengthy description of such commercials and noted that Pabst spent over $25 million annually on advertising its beer.

Advertising was the focus of two of the plaintiff's claims. First, the "untrammeled marketing practices" made beer-drinking an abnormally dangerous activity because they encouraged customers to drink in taverns and then, presumably, to drive home. Second, Pabst should have included a warning—either on the bottle or in the advertising—that excessive use was dangerous; without such a warning, the beer was a defective product. By arguing that the dangers of drunken driving were well known, Pabst successfully defeated both claims. The Iowa Supreme Court ruled that there was no basis for a suit.

It is not clear from the opinion whether the court had the assistance of any experts in assessing the commercials' effects on impaired drivers in general or on the particular driver involved in the accident. However, it is easy to identify areas in which a consumer behavior researcher could have assisted Pabst in its defense. Making use of existing studies of alcohol advertising or conducting empirical research on the specific ads in question might have demonstrated the difficulty of forging a causal link between viewing such ads and driving while intoxicated. Research might also have illustrated the difficulty of designing an appropriate and effective warning and communicating such a warning through advertising. A thoughtful court might require this sort of evidence if it were to be receptive to a state-of-the-art kind of defense regarding the capabilities as well as the limitations of commercial advertising as it influences product use.[3]

It is just as easy to identify points in the plaintiff's argument that could have been

bolstered by a marketing expert. Maguire might have improved his chances by demonstrating that the driver who hit him was youthful, a part of the target market defined by the defendant's own market strategy documents; by pointing to copy objectives associating product use with recreation and social acceptance; by emphasizing sales and market figures; by pointing to data indicating a lack of knowledge or appreciation by those in the target market of the risks associated with improper use of this product; by demonstrating that the manufacturer had been placed on notice of common improper use of the product by those in the target market; and, finally, by pointing to an absence of corporate concern as evidenced by a failure to include in its multimillion dollar advertising campaigns any precautionary comment. This litany is obviously not meant to be case-specific; it is amenable to the analysis of typical company market research as well as the conduct and analysis of a specially designed study that a consumer researcher may undertake in response to litigation.

In many cases the defense will raise questions about specific consumer behavior—what the plaintiff or user of the product did or failed to do. One such approach argues that the product was used in a way that amounted to reckless misuse and was consequently unforeseeable by the marketer. Another and related argument says that by using the product so recklessly the plaintiff was guilty of contributing to the injury. This is nearly synonymous with an "assumption of the risk" defense. Finally, if misleading advertising is a part of the claim, the defendant can argue that the plaintiff was not influenced to act dangerously because of these ads. If the defense chooses one of these approaches, the expert in consumer behavior can once again provide valuable guidance and assistance. Whether the plaintiff's use was intended, recommended, normal, foreseeable, reckless, or misuse are key questions. The answer may be a function of the court's interpretation of marketing documents, the advertising itself, direct testimony from the consumer, and any testimony from either side's consumer experts.

A consumer researcher may be an especially effective expert witness when the plaintiff claims deceptive advertising and the defense responds by stressing facts about the plaintiff's behavior. What do the ads really say to a consumer about the way the product can be safely used? Plaintiffs and defendants will obviously have different answers. The expert who has valid empirical data should be able to help the court to choose between the answers.

One difficulty that may arise in gathering valid empirical data on advertising is the problem of timeliness. If the accident occurred two or three years before the trial, any advertising that influenced the plaintiff may have been seen years ago. A researcher who tests the perceptions of similar consumers today when they see the same ads must take into account that the world has changed. The test subjects, although similar to the plaintiff, may be more sophisticated about that particular product than they were years ago. New competitors with different claims may have influenced their ideas, or they may have learned more about the product through other channels. A recent *JPP&M* article provided an especially relevant discussion of such "history effects" [Mazis, McNeill and Bernhardt 1983, p. 30]. Such concerns must be taken into account when answering the question of what the ads meant to the particular plaintiff at a particular point in time.

An issue of importance in the products liability conflict involves advertising as a vehicle for warnings. When a plaintiff charges that the ads themselves should have contained some warning of the risks associated with the product, the defense needs a marketing expert to refute this proposition, which may be appealing for a variety of reasons. Bettman, Payne and Staelin [1986, p. 19] put the case succinctly:

> Ads are viewed by consumers at a time different from either purchase or use. Thus if the consumer is to use the information at these times he/she must encode the message when viewing the ad and then retrieve the acquired information at a later time. Conse-

> quently, this medium is not in general as effective in providing hazard information as point of purchase displays, labels, or package inserts which are available at purchase or use. Moreover, given the time limitations associated with a TV ad (TV ad exposures are normally 30 seconds or less), we do not believe ads can effectively convey detailed safety information.

They suggest that ads can be educational if they show consumers checking labels for instructions as to how to use products. If the ads present models for consumers to follow, they may be more effective than if they try to give detailed information about products or safety hazards. Issues of viewer expectation, attention, and retention suggest the inappropriateness of commercial advertising for the provision of precautionary information. At the same time, the facts of a particular case may suggest the necessity of various types of consumer warnings. When this happens, the court may benefit from expert opinion on both sides of the issue.

Recommendations for the Future

I. Courts Should Be Guided by the FTC's Definition of "Deception" When They Consider a Case Involving Advertising

As the Federal Trade Commission has responded to recent budget cuts and to the philosophy of the current administration, it has restated its definitions of "unfairness" and "deception" in policy statements and recent opinions. Critics do not agree on whether these new statements reflect actual changes in policy or are just clearer summaries of what has always been the Commission's policy. However, those involved in products liability litigation could benefit from studying the FTC's 1983 statement on what makes an ad misleading or deceptive. The Commission summed it up in *FTC v. International Harvester* [1984]:

> [A] deception case requires a showing of three elements: (l) there must be a representation, practice, or omission likely to mislead consumers, (2) the consumers must be interpreting the message reasonably under the circumstances, and (3) the misleading effects must be "material," that is, likely to affect consumers' conduct or decision with regard to a product.

Some commentators see this as a higher standard of proof preventing commissioners from looking at an ad and deciding for themselves whether or not it is deceptive. Extrinsic evidence will be required. "The new view makes more use of economics and places increased emphasis on consumer research" [Ford and Calfee 1986, p. 83].

How would products liability litigation benefit if courts were to use such a definition as a standard for a claim of misrepresentation? Probably the major effect would come from enforcing the second requirement uniformly. Some courts have not required reasonable behavior or a reasonable miscomprehension on the part of the consumer—witness the decision for the plaintiff in *LeBouef* [1980]. If there were some such standard in all jurisdictions, multi-state litigation would be less complicated and more fair for manufacturers doing business throughout the country. Since the FTC's rulings apply throughout the country, it may be worth considering their use as a guideline. The application of such standards would certainly result in an increased reliance on research data, expert analysis, and expert opinion.

II. Consumer Researchers Should Assist Attorneys in All Stages of Trial Preparation

The contemporary product liability lawsuit is likely to include advertising to support a variety of charges. Rarely are these allegations stated with sufficient specificity to identify or evaluate issues of causation. How did the advertising in question cause, or operate as a substantial contributing factor to, this injury? Initially, an attorney evaluating a products liability cause of action may have nothing more than vaguely stated claims. Observation suggests that at some point in the develop-

ment of a case—sometimes sooner, sometimes later—counsel recognizes the significance of issues related to the manufacturer's marketing practices, including its advertising campaigns. Whether this occurs while developing a theory of the case, participating in discovery, structuring pretrial research, or planning for direct and cross examinations, this is the time when counsel for either side will be wise to consult an expert on consumer behavior in response to advertising.

There is a strong likelihood that neither plaintiff's nor defendant's attorney may be familiar with elementary principles of consumer psychology or market research procedures. Consequently, a significant issue of fact or discovery strategy may go unrecognized. If there is even a hint of advertising allegations, there are many questions in the initial investigation of a case that would be aided by the input of a consumer researcher or marketing expert. Table 2 summarizes the questions the expert and the attorney will want to answer together in order to be prepared for whatever advertising/marketing issues may arise at trial.

Issues related to promotional literature, product labeling, and sales representations must be identified and their significance evaluated. Such information can direct the investigation so important facts will not be lost. Marketing experts must be armed with facts to support their opinion just as reconstructionists, biomechanicists, or economists must.

If the usual market research has been conducted, the resulting data should be analyzed for possible use in developing strategies. Routine market research may very well exist that defines and describes such characteristics as target market, product positioning, consumer perceptions and expectations, use patterns, purchase decision factors, marketing strategies, marketing budgets, customer concerns, and product planning.

III. Researchers Should Consider Carrying Out Case-Specific Studies of Consumer Behavior

An evaluation of existing research or the absence of such research may result in the design and conduct of case- or litigation-specific consumer research. Such data may help to identify consumer reactions to the specific advertising in question as well as consumer expectations of the product and product category in general. Anyone designing research on perceived advertising claims would be wise to consult Plevan and Siroky's new book, *Advertising Compliance Handbook* [Plevan and Siroky 1988].

Proper research would arguably raise the analysis above the level of mere expert opinion offered on the basis of "experience and training in the field," or even worse, mere speculation. However, the introduction of the usual market research data or the decision to pursue case- or litigation-specific testing or surveys exposes the expert and counsel to another set of consumer research problems as well as to a series of difficult forensic issues. Issues involving methodology, relevance, interpretation, and validity will be immediately evident to *JPP&M* readers. The risks, limitations and benefits of consumer research must of course be carefully considered. The ability of a consumer researcher to function effectively as a consulting or testifying expert in the course of discovery and trial will, of course, depend on the reliability and validity of any empirical data being offered as evidence, whatever its source. However, consumer researchers should recognize that counsel may reject some proposals for customized research despite the clear benefits these might bring. Cost and time constraints are obvious reasons for such a rejection. Another reason may be less obvious to the uninitiated: such research data are, by the rules of evidence, discoverable by the opposition. If there is a chance that research results could be damaging, an attorney may feel that the research is better left undone.

Much more needs to be known about the manner and extent to which advertising interacts with other components of the marketing mix (packaging, direct sales pitches) or other components of the external environment (direct experience with

Table 2. Questions for the Consumer Researcher Involved in Products Liability Litigation

Stage 1: Theory Development

- Was the conduct of the plaintiff or the defendant foreseeable, intended, or recommended?
- Was there misuse or abuse of the product?
- Was there contributory fault?
- Was there an assumption of the risk due to prior product-related experience or knowledge of the plaintiff?
- Was there reliance on the advertising by the plaintiff?
- Were the representations made in the advertisements in fact false?

Stage 2: Discovery

- What promotional materials had the plaintiff seen or been given before the purchase? Before the accident?
- What representations were made in the course of the sale? By whom? To whom?
- What sources of product information were consulted by the consumer/user prior to purchase or use?
- If the product used involves a degree of risk, what other risk-taking did the plaintiff participate in actively?
- If the product came with an owner's manual or other printed material, had the plaintiff read it? If not, why not? Was it instructional or promotional or both?
- What were the manufacturer's advertising or marketing strategies?
- What was the target market?
- What were the copy objectives of the advertisements in question?
- Was there a correlation between sales and advertising budget?

Stage 3: Pretrial Research

- Does market research regarding consumer perception exist?
- What does it say?
- How does advertising influence consumer behavior and consumer perceptions?
- Does advertising inform or manipulate?
- What is its role in providing product information?
- Is advertising an effective medium for providing precautionary information?
- Can the expert discern the manufacturer's knowledge, intent, marketing objectives through externally generated market research data or internal documentation?
- Can specially designed research demonstrate what the mythical "reasonable man's" perceptions of the advertising involved should be?

Stage 4: Planning Direct and Cross Examinations

- How was the advertising relevant to the plaintiff at the point of purchase?
- How was the advertising relevant to the plaintiff's decision about subsequent product use?
- How was the advertising relevant to the sequence of events that actually resulted in the injury?
- If reliance is claimed, was it justifiable?

the product, testimonials from friends). What role does each play in influencing consumer attitudes and purchasing behavior? The presence of these other factors—some under the marketer's control and some not—complicates and may inherently doom definitive efforts to determine "causality." As one commentator [Barnes 1983, pp. 43–44] remarked:

> The experimenter's inability to control social phenomena is the source of much error. The perceptions of a television viewer regarding the nutritional benefits of Wonder Bread have been affected by numerous forces external to the advertiser's control. These forces contaminate the conclusions of the surveyor just as awareness by a clinical subject or observer affects the blindness, and therefore the relevance, of a clinical investigation. Litigation guidelines might require that the direction of any bias

> resulting from uncontrolled factors, and the associated legal significance, be explicitly identified . . .

When marketing research is conducted for a specific lawsuit, it runs the risk of being criticized as hastily done, inadequately designed, and biased. What kinds of research designs are most appropriate and most acceptable to courts? What useful facts about the influence of advertising can be generally agreed upon? Can research filter out product impressions that consumers receive from sources other than advertisers? Basic research on advertising could answer many of these questions, and if it were unrelated to any particular lawsuit, it would not be suspect in the courts.

Although legal skepticism about the power of advertising allegations may mislead counsel into ignoring the advertising issue, a consumer researcher can help to dispel such skepticism. An expert witness can explain research techniques such as copy testing, focus groups, surveys, and other marketing research tools, as well as the role advertising plays in providing consumer information more generally. Without such assistance the uninitiated judge or jury is free to place too much emphasis on unsophisticated, overly simplified, if not plain inaccurate, speculation—ignoring the importance or misinterpreting any empirical data that do exist.

It may be that questions raised in a particular lawsuit are unanswerable or are answerable only with advertisement- or case-specific data, and then issues of whether the data are conclusive, relevant, or reliable remain. Even the best research design may leave some percentage of consumer perception and expectation unaccounted for, and the issue of whether this plaintiff's individual perceptions and expectations fall into that percentage is likely to arise.

How far can we go in applying expert opinion and empirical research to individual facts, individual plaintiffs and defendants? The problem is akin to that of actuarial prediction in industrial psychology: Can we use our knowledge of individual circumstances to make predictions more accurate than the statistical predictions based on aggregate data from a similar population? Ethics also enter into the debate: To what extent is a "consumer researcher" (perhaps a psychologist, perhaps not) qualified to give an opinion as to what a particular individual would have done under other circumstances?[4] Even when such an opinion is supported by convincing research that establishes how consumers similar to the plaintiff have perceived the same advertisements, there is always a loophole: The plaintiff is apt to insist on being an exception to the general rule, among the 5 percent who interpreted the advertising claim differently. It should be apparent that empirical research, despite its usefulness as an adjunct to expert opinion, can always be challenged on grounds of relevance, reliability, and interpretation.

Finally, it is important for the consumer researcher to realize that his or her inability to support or deny conclusively the claims made by either side about the plaintiff's perceptions or expectations or about the effects of the advertising is not a fatal flaw. The expert's usefulness in developing strategy still remains. Research findings rarely speak for themselves, as consumer researchers should realize. The consumer expert can provide important guidance to the court in interpreting any available empirical data and can caution the court about the dangers of basing interpretations on inadequate data.

Conclusion

Trends in the use of consumer research in the context of products liability litigation are emerging. Plaintiffs' arguments increasingly appear to focus on inferences, implications and omissions versus explicit representations or literal meanings contained within advertisements. Theories concerning the subconscious or latent effect of advertising will be advanced more frequently, thereby avoiding questions

regarding evidence of exposure, recall, or justifiable reliance upon advertising. There will be an increased use of survey data, all kinds of market research data. As the questions grow more complex, the role of the marketer or consumer behavior researcher will become more central to the products liability case. In deciding what effects should and should not be attributed to defendants' advertising, attorneys and judges will increasingly recognize the need for expert assistance of the type described in this article.

Notes

1. For example, a recent Westlaw search for opinions mentioning advertising in the same paragraph with products liability turned up 13 cases, 8 of them from the 1980s.
2. Because there had to be a bargain, privity of contract generally was required in an express warranty case. U.C.C. §2-313. The fact that only a party to a contract can sue may be one reason why the cause of action is less popular now than it once was.
3. Apparently the court did not need prodding to see the inappropriateness of a warning label, as this comment shows:

   > Plaintiffs urge that, without an adequate warning by the supplier as to the effects of varying quantities of beer on the consumer, the latter cannot be expected to know how much consumption is too much. This contention brings to mind the suggestion wisely advanced by Eleanor Roosevelt in 1932 that "the average girl faces the problem of learning, very young, how much she can drink of such things as whiskey and gin, and sticking to the proper quantity." . . . This continues to be good advice today for both men and women.

4. The skeptical reader should see the opinion in *Rogers v. R. J. Reynolds Tobacco Co.* [1988], which quotes the director of the Social Psychology/Behavioral Medicine Research Group at a major university as expressing this view:

   > The behavioral sciences are sufficiently developed to do a behavioral analysis of a cigarette smoker, as of 1965, to determine the likelihood that such smoker would have quit had he held beliefs of the risk of disease and death from cigarette smoking that conformed to the prevailing views at that time of the medical and scientific community.

References

American Safety Equipment Corp. v. Winkler (1982), 640 P.2d 216 (Colo.).

Barnes, David W. (1983), "The Significance of Quantitative Evidence in Federal Trade Commission Deceptive Advertising Cases," *Law and Contemporary Problems*, 46, 25–47.

Baughn v. Honda Motor Co., Ltd. (1986), 107 Wash. 2d 127, 727 P.2d 655.

Beasley, James (1981), *Product Liability and the Unreasonably Dangerous Requirement.* Philadelphia, PA: American Law Institute—American Bar Association.

Bettman, James R., Payne, John W. and Staelin, Richard (1986), "Cognitive Considerations in Designing Effective Labels for Presenting Risk Information," *Journal of Public Policy and Marketing*, 5, 1–28.

Blevins v. Cushman Motors (1977), 551 S.W.2d 602 (Mo.).

Drayton v. Jiffee Chemical Corp. (1975), 395 F. Supp. 1081 (N.D. Ohio).

Dworkin, Terry Morehead and Sheffet, Mary Jane (1985), "Product Liability in the '80's," *Journal of Public Policy and Marketing*, 4, 69–79.

Ford, Gary T. and Calfee, John E. (1986), "Recent Developments in FTC Policy on Deception," *Journal of Marketing* (July), 82–103.

FTC v. International Harvester Co. (1984), 104 F.T.C. 949.

Hauter v. Zogarts (1975), 120 Cal. Rptr. 681, 534 P.2d 377.

Haynes v. American Motors Corp. (1982), 691 F.2d 1268 (8th Cir.).

Honigwachs, Joshua (1987), "Is It Safe To Call Something Safe? The Law of Puffing in Advertising," *Journal of Public Policy and Marketing*, 6, 157–70.

LeBouef v. Goodyear Tire & Rubber Co. (1978), 451 F. Supp. 253 (W.D. La.).

LeBouef v. Goodyear Tire & Rubber Co. (1980), 623 F.2d 985 (5th Cir.).

Leichtamer v. American Motors Corp. (1981), 67 Ohio St. 2d 456, 424 N.E.2d 568.

Maguire v. Pabst Brewing Co. (1986), 387 N.W.2d 565 (Iowa).

Mazis, Michael B., McNeill, Dennis L. and Bernhardt, Kenneth L. (1983), "Day-After Recall of Listerine Corrective Commercials," *Journal of Public Policy and Marketing*, 2, 29–37.

Morgan, Fred W. (1979), "The Products Liability Consequences of Advertising," *Journal of Advertising* (Fall), 30–37.

——— (1984), "Punitive Damages Awards for Flagrant Mismarketing of Products," *Journal of Public Policy and Marketing*, 3, 113–24.

——— (1987), "Strict Liability and the Marketing of Services vs. Goods: A Judicial Review," *Journal of Public Policy and Marketing*, 6, 43–57.

Mowen, John C. (1983), "On the Role of Marketing in the Product Liability Trial," *Journal of Public Policy and Marketing*, 2, 100–21.

Plevan, Kenneth A. and Siroky, Miriam L. (1988), *Advertising Compliance Handbook*. New York: Practising Law Institute.

Rogers v. R. J. Reynolds Tobacco Co. (1988), LEXIS 3117 (Tex. App.).

Rogers v. Toni Home Permanent Co. (1958), 147 N.E.2d 612 (Ohio).

Whitman, Douglas (1981), "Reliance as an Element in Product Misrepresentation Suits: A Reconsideration," *Southwestern Law Journal*, 35, 741–73.

Woods on Behalf of Woods v. International Harvester (1983), 697 F.2d 635 (5th Cir.).